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MEMORANDUM FOR BOB FABER
CHIEF FINANCIAL OFFICER
OFFICE OF INTERNAL CONTROL

FROM: Neil B. Worden
Chief, Claims, Labor, and Personnel Law Branch
General Legal Services CC:GLS:CLP

SUBJECT: FY 2008: Review of Section 1204 TIGTA Review Results

This memorandum responds to your request that we review documents pertaining to seven different employees and comment on potential Section 1204 violations which TIGTA discovered therein as a result of the Fiscal Year 2008 Section 1204 Review. While these are matters on which reasonable minds may disagree, it is our opinion that of the matters you have referred to us for review, only one of the excerpts appears to contain a violation of Section 1204. We believe, however, several of the excerpts may violate the IRS policy prohibiting the use of ROTERS in self-assessments. Before going into each of the matters referred to us, we want to take this opportunity to discuss the dichotomy between Section 1204 and the IRS' internal policies.

Section 1204 prohibits the Service from using "records of tax enforcement results" (1) to evaluate employees; or (2) to impose or suggest production quotas or goals on employees.¹ 26 C.F.R. § 801.3T (e) prohibits any IRS employee

¹ A "tax enforcement result" is defined as the "outcome produced by an Internal Revenue Service employee's exercise of judgment recommending or determining whether or how the Internal Revenue Service should pursue enforcement of the tax laws," and includes such things as liens filed; levies served; seizures executed; amounts assessed and collected; fraud referrals. 26 C.F.R. Section 801.6T(d)(1). A record of tax enforcement results (ROTTER) is defined at 26 C.F.R. Section 801.6T(d)(2). That provision states that records of tax enforcement results include data, statistics, and information of the tax enforcement results reached in one or more cases. 26 C.F.R. Section 801.6T(d)(2) states that ROTERS "do not include tax enforcement results of individual cases when used to determine whether an employee exercised appropriate judgment in

from using ROTERS to evaluate any *other* employee. Neither Section 1204 nor 26 C.F.R. § 801 prohibits an employee from discussing ROTERS in a self-assessment. By contrast, the Service has implemented a policy which prohibits employees from including specific tax enforcement results in written self evaluations. IRS policy, as reflected in IRM 1.5.2.18 states:

(3) If a bargaining unit employee includes a ROTER in a self-assessment, the manager will explain why the employee should not use a ROTER and ask the employee to remove it; the manager will not use the ROTER in the employee's evaluation.

(4) If a non-bargaining unit employee includes a ROTER in a self-assessment, the manager will not accept the assessment and will direct the employee to revise the document removing the ROTER. The manager will not use the ROTER in the employee's evaluation.

Therefore, the dichotomy presented is that there is no Section 1204 violation when an employee specifically mentions ROTERS in a self-assessment submitted to a manager as input for an appraisal. Those same statements, however, could be violations of IRS policy as cited above.

The opinion which follows will focus on whether the matters identified violate Section 1204. Since your Office is in a better position than ours to determine the parameters of the IRS Policy, we will not comment on your position with respect to violations of what is set forth in the IRM. While reasonable minds may disagree, it is our opinion that without further explanation the second excerpt regarding _____ appears to violate Section 1204 while the other statements do not.

The following excerpt appears in a Team Manager's Summary Evaluation Self-Assessment under a section titled Customer Service:

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Tax enforcement results can include dollar results. See IRM 1.5.2.7. However, a reference to a dollar amount is not always an indication of a ROTER. The activity here, the processing and posting of payments over previously closed audit cycles, appears to be administrative and unrelated to any tax enforcement activity. Assisting a taxpayer in posting payment is not a ROTER. See IRM 1.5.7.9; IRM 1.5.2.8. In this case, _____ appears to have been assisting the taxpayer in posting late payments to prior tax years; the reference to the dollar

pursuing enforcement of the tax laws *based upon a review of the employee's work on that individual case.*" (emphasis added)

amount seems to have been made to emphasize that this was a significant undertaking. In our opinion, the language cited by the TIGTA reviewer does not utilize a ROTER.

The following excerpt is contained in a Bargaining Unit Performance Appraisal narrative under Customer Satisfaction - Knowledge (Critical Element 2):

The comment appears in an appraisal narrative which discusses

The TIGTA reviewer found that the use of "substantial" to describe the "adjustments which the TP agreed to" was a ROTER. We disagree. "[R]ecords of tax enforcement results do not include tax enforcement results of individual cases when used to determine whether an employee exercised appropriate judgment in pursuing enforcement of the tax laws based upon a review of the employee's work on that individual case." 26 C.F.R. § 801.6T(d)(2). The properly computed adjustments were tax enforcement results in a specific case, and work on that case was reviewed by his manager as part of his evaluation. The case was cited by manager as an example of exercise of appropriate judgment in researching the Code, regulations, and court cases to determine whether the taxpayer's position was correct, and upon determining that it was incorrect, pursuing and achieving a favorable outcome for the IRS. Therefore, in our opinion, the language cited by the TIGTA reviewer does not violate the proscription against the use of ROTERS in evaluating employees who exercise judgment with respect of the enforcement of the tax laws.

You are seeking our opinion regarding two separate excerpts which appear in the self-assessment of a manager for his own mid-year performance review. The first excerpt states:

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We are unsure of the meaning of the statement in bold, and we are therefore uncertain whether it contains a ROTER. It is unclear to us whether the statement discusses tax enforcement results or simply refers to outcome-neutral cases being opened. Outcome-neutral production data that does not contain information regarding specific tax enforcement results reached in a case involving particular taxpayers constitutes a quantity measure, not a ROTER. See 26 C.F.R. Section 801.6T(c). The regulations specifically mention case openings and case closings as examples of quantity measures. See *id.* If the excerpt above concerns outcome-neutral quantity data, then Section 1204 has no application. If the excerpt describes the outcome produced by an Internal Revenue Service employee's exercise of judgment recommending or determining whether or how the Internal Revenue Service should pursue enforcement of the tax laws, then this self-assessment contains a ROTER. However, whether or not a ROTER is present here, we do not believe this statement constitutes a violation of Section 1204.

As explained above, Section 1204 prohibits any IRS employee from using ROTERS to evaluate any *other* employee. See also 26 C.F.R. Section 801.3T(e). Nothing in Section 1204 prohibits employees from placing tax enforcement results in their own self-assessments. As there is no indication in the documentation provided that the excerpt appeared in anything but self-assessment, this excerpt does not violate Section 1204 regardless of whether it contains a ROTER. We note that if the statement does in fact contain a ROTER, then its use would seem to violate IRS policy as set forth in IRM 1.5.2.18 which prohibits employees from including ROTERs in self-assessments.

The second excerpt at issue in the self-assessment states:

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The excerpt does not contain information regarding specific tax enforcement results reached in a case. Rather, this matter appears to refer to outcome-neutral quantity data regarding case closings. As discussed above, the number of cases closed is a quantity measure. 26 C.F.R. Section 801.6T(c). See also IRM 1.5.9.4(1)a. Quantity measures are not tax enforcement results. 26 C.F.R. Section 801.6T(d). Therefore, in our opinion, this excerpt does not contain a ROTER.

You are seeking our opinion regarding five separate excerpts connected to the mid-year review of _____, a manager. You have informed us that the first two excerpts below appeared in _____ actual mid-year review document, while the remaining three appeared in the self-assessment he submitted to his supervisor.

According to the applicable regulations, no IRS employee may use ROTERS to evaluate any other employee when the evaluation is conducted for the specific purposes of 1) a required or requested performance rating; 2) a recommendation for an award; 3) an assessment of qualifications for promotion, reassignment, or change in duties; 4) an assessment of eligibility for incentives, allowances, or bonuses; and 5) ranking of employees for release/recall and reductions in force. See 26 C.F.R. Section 801.3T (e). This includes a mid-year performance review. See E-mail to All Managers from Acting Commissioner Kevin Brown: Improving Performance through Understanding Section 1204 and Regulation 801 at _____

Therefore, if ROTERS are present in the first two excerpts, which appeared in _____ mid-year review, their use in that document would violate Section 1204. The first excerpt states:

A “tax enforcement result” is defined as the “outcome produced by an Internal Revenue Service employee’s exercise of judgment recommending or determining whether or how the Internal Revenue Service should pursue enforcement of the tax laws.” 26 C.F.R. Section 801.6T(d)(1)(i). This excerpt does not appear to assess any outcome produced by _____ determination on whether or how the Service should pursue enforcement of the tax laws. It appears to discuss inventory status, which is not a tax enforcement result. See IRM 1.5.9.4 (1). For these reasons, we do not believe the statement constitutes a ROTER. Rather, the excerpt appears to discuss an outcome neutral quantity measure (case starts). Such information does not implicate Section 1204. See 26 C.F.R. Section 801.6T(c) and (d).

The second excerpt which appeared in

mid-year review states:

Our analysis of this second excerpt is similar to our analysis of the first one. We see no ROTER in this excerpt. Overage is not a figure directly related to an employee exercising judgment recommending or determining whether or how the Agency should pursue enforcement of the tax laws, and therefore it is not a ROTER. See IRM 1.5.9.4 (1) (e). Similarly, based on our understanding, it does not seem that pick-up rate is a matter resulting from an employee exercising judgment regarding enforcement of the tax laws. This excerpt appears to combine an outcome neutral quantity measure (pick-up rate) and a quality measure (overage percentage). Neither quality measures nor outcome neutral measures implicate 1204. See 26 C.F.R. Section 801.6T(b) and (c).

You have confirmed that the remaining three excerpts regarding appear only in his self-assessment, not in his actual mid-year review. In our opinion, therefore, they would not violate Section 1204 even if they contained ROTERs, as there is no Section 1204 violation when an employee mentions ROTERS in a self-assessment submitted to his or her manager as input for an evaluation.

If ROTERs were present in those same statements, their use would violate IRM 1.5.2.18 (4) which prohibits a non-bargaining unit employee from including a ROTER in a self-assessment. Based on our analysis, however, we do not believe these excerpts contain ROTERs, and therefore we see no violation of IRS policy. We have provided our analysis to demonstrate how we arrived at this conclusion.

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The statement in bold does not appear to contain an outcome produced by an Internal Revenue Service employee's exercise of judgment recommending or determining whether or how the Agency should pursue tax enforcement. Rather, the excerpt appears to discuss an increase in cases started. Such data is an outcome neutral quantity measure, not a ROTER. See 26 C.F.R. Section 801.6T(c) and (d); IRM 1.5.9.4(1).

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The mention of considerable tax and penalties could be ROTERs in some circumstances, as amount assessed and amount collected are ROTERs. See IRM 1.5.2.6. However, "ROTERs do not include tax enforcement results of individual cases when used to determine whether an employee exercised appropriate judgment in pursuing enforcement of the tax laws based upon a review of the employee's work on that individual case." 26 C.F.R. Section 801.6T(d)(2). See also IRM 1.5.2.7(2). In our opinion, this excerpt reviews the employee's work on a specific case to demonstrate the employee utilized appropriate judgment in pursuing enforcement of the tax laws in that specific case. Therefore the statement in bold is not a ROTER.

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The excerpt does not contain information regarding specific tax enforcement results reached in a case. The statement at issue discusses the number of cases closed, which is outcome neutral quantity data as opposed to a ROTER. 26 C.F.R. Section 801.6T(c) and (d); IRM 1.5.9.4(1)a. Even though the statement in bold could be seen as suggesting a production goal (i.e. closing cases within the required timeframe), the excerpt is not utilizing a ROTER to

suggest that goal. Moreover, the sentence appears in a self-appraisal and imposes a goal on no one. Therefore, in our opinion, this excerpt does not violate any prohibition regarding the use of ROTERS.

The comment at issue appears in a self-assessment under the heading Business Results.

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Indictment rate and conviction rate are specifically listed as examples of ROTERS in the CI context. See IRM 1.5.5.3(1). However, because this sentence appears in a self-assessment, the use of the ROTERS in this document does not constitute a Section 1204 violation. Section 1204 prohibits any IRS employee from using ROTERS to evaluate any *other* employee, and this is an instance of *self* evaluation. See 26 C.F.R. Section 801.3T(e). Therefore, even though the excerpt contains ROTERS, we see no Section 1204 violation based on the fact that the comment appears in a narrative prepared by _____ about himself. We note that the use of ROTERS in a self evaluation does violate the IRM, which prohibits the use of ROTERS in self-assessments. See IRM 1.5.2.18(4); IRM 1.5.5.3(10).

The excerpt below appears in a self-assessment under the heading Efficiency and Business Systems Integrity.

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Based on IRM 9.9.4.1, an "SCI" is a "subject criminal investigation" which is initiated by a Special Agent when appropriate. As such, it would appear that an SCI stems from an employee exercising judgment recommending or determining whether or how the Agency should pursue enforcement of the tax laws. In some circumstances, we would find this to be a ROTER. In the context above, however, the mention of SCI seems to be solely in the context of an overage issue, as _____ is attempting to explain why his "overage inventory" seems high. Inventory information and overage items are not ROTERS. See IRM 1.5.5.4(2) and (4).

The next excerpt is *not* from a self-appraisal. It appears in a summary narrative evaluation written by _____ supervisor.

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You have asked for our opinion regarding whether the use of the word significant in this excerpt (i.e. “significant cases” and “a significant role”) constitutes a ROTER. We do not believe it does. A “tax enforcement result” is defined as the “outcome produced by an Internal Revenue Service employee’s exercise of judgment recommending or determining whether or how the Internal Revenue Service should pursue enforcement of the tax laws.” 26 C.F.R. Section 801.6T(d)(1). Examples of tax enforcement results include such things as liens filed; levies served; seizures executed; amounts assessed and collected; fraud referrals. 26 C.F.R. Section 801.6T(d)(1). Choosing to use the adjective “significant” to describe a case or a role does not render that case or role a ROTER.

By contrast, the final sentence of the excerpt contains a bare statement regarding types of violations in the cases _____ has worked during the time period for which he is being evaluated. In our opinion, the determination that “violations included tax and money laundering” is an outcome produced by an Internal Revenue Service employee’s exercise of judgment recommending or determining whether or how the Internal Revenue Service should pursue enforcement of the tax laws. Had that exercise of judgment resulted in a determination that no tax or money laundering violations had occurred, the Agency’s enforcement actions would likely have taken a different direction. Therefore, we believe the final sentence of this excerpt violates Section 1204, as it uses ROTERs in _____ evaluation. The sentence seems to improperly utilize ROTERs – rather than critical job elements and standards - to evaluate _____. It also seems to improperly suggest that finding tax and money laundering violations is a goal which garners praise.²

² Arguably, the phrase “violations included tax and money laundering” may be seen as language which *suggests* ROTERs as opposed to actually containing ROTERs. See IRM 1.5.5.3(3). Such a phrase would not technically violate Section 1204. It would, however, constitute a violation of the IRM prohibition against using “soft language or phrases that are suggestive of ROTERs” when evaluating an employee.

Both of the excerpts below appear in a self-assessment written by

In our opinion, both of the excerpts contain ROTERs. For the reasons explained in the previous analyses, we do not believe that ROTERs used in self-assessments violate Section 1204. However, ROTERs in self-assessments would violate IRS policy.

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As we stated earlier, inventory information does not constitute ROTERs. See IRM 1.5.5.4(2) and (3). The mention of completed investigations, therefore, is not a ROTER. It does not implicate an IRS employee's judgment regarding whether or how to enforce the tax laws. By contrast, an "SCI" is a "subject criminal investigation" which is initiated by a Special Agent when appropriate. IRM 9.9.4.1. As such, it would appear that an SCI stems from an employee exercising judgment recommending or determining whether or how the Agency should pursue enforcement of the tax laws. In this excerpt, _____ mentions a rise in open SCI cases as a factor he believes should be rated as a positive by his supervisor. Given the context, we believe SCI is a ROTER in this excerpt.

Prosecution recommendations and conviction rate are specifically listed as examples of ROTERs. See IRM 1.5.5.3 (1)(c) and (p). Additionally, "percent to prison" may be considered a ROTER as it is certainly the result of an IRS employee's exercise of judgment regarding whether to pursue enforcement of the tax laws. As we have explained, however, we do not believe the use of ROTERs in a self-assessment violates Section 1204.

We are unsure of the meaning of legal source income cases, so we are unable to opine as to whether it is a ROTER. However, it is clear that number of convictions, conviction rate, number of indictments, indictment rate, and prosecution rate are specifically listed as examples of ROTERs. See IRM 1.5.5.3 (1) (d) (m), (n),(o) and (p). While "sentencing" may not technically be a ROTER, its use here appears to be "soft language" which is suggestive of a ROTER. See IRM 1.5.5.3 (3)(g) and (k). In his self-appraisal, _____ is citing to a rise in certain ROTERs as a "very positive measurement tool." While we do not believe this violates Section 1204, since the regulation

does not prohibit the use of ROTERS to evaluate oneself, we believe it violates the IRS prohibition against using ROTERS in self-assessments. See IRM 1.5.5.3 (10). Finally, we do not believe the mention of direct investigative time (DIT) in the last sentence is a ROTER. See IRM 1.5.5.4 (2) and (3).

CONCLUSION

Section 1204 prevents an IRS employee from using records of tax enforcement results to evaluate any other employee or to impose or suggest production quotas or goals. It does not, however, prohibit the use of ROTERS in self-assessments. Consequently, of the matters you presented to us we view only one excerpt - the second excerpt regarding - as a violation of Section 1204. This excerpt appears to be an attempt by

supervisor to evaluate him based on ROTERS and to suggest the goal of finding tax and money laundering violations when working on a case. We did find ROTERS in the other excerpts regarding , who are all employees in CI. While we do not believe the ROTERS in those self-assessments violate Section 1204, they may constitute violations of the IRM. Given the numerous ROTERS we identified in the documents written by CI employees, you might consider conferring with the CI Section 1204 Program Manager regarding a fresh approach to effectively convey the ROTERS prohibitions to that organization.

If you have any questions regarding this matter, please feel free to contact Jennifer Grabel at (202) 927- .